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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

CALIFORNIA PILOTS ASSOCIATION et al., Plaintiffs and Appellants, v. COUNTY OF BUTTE et al., Defendants and Respondents.	C034216 (Super. Ct. No. 122720)
CALIFORNIA PILOTS ASSOCIATION et al., Plaintiffs and Appellants, v. ROBERT STEPHENS et al., Defendants and Respondents.	C035428 (Super. Ct. No. 122720)

In this case, we consider the decision of defendant Butte County Board of Supervisors (the Board) to overrule plaintiff

Butte County Airport Land Use Commission (the Commission) and rezone a tract of land near the Chico Municipal Airport (Chico Airport) to permit increased residential development. The Commission initially approved the proposed development as consistent with the Chico Municipal Airport Environs Plan (Chico Airport Plan), but then amended the plan and found the proposal to be inconsistent with the amended plan. The Board exercised its authority, under Public Utilities Code section 21676, subdivision (b), to overrule the Commission, adopting written findings in support of the decision.[1] The superior court denied a mandamus petition filed by the Commission and two pilots organizations (collectively, plaintiffs) challenging the Board's action.

Plaintiffs principally contend that "[t]he Board erred in failing to make specific findings based on substantial evidence in the record as required by" section 21676, subdivision (b).[2] We disagree and shall affirm.

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[1] Further undesignated statutory references are to the Public Utilities Code.

[2] The introduction summarizes the issues that are cognizable under the administrative mandamus statute, Code of Civil Procedure section 1094.5, which governs this court's review. Plaintiffs, however, muddy the waters by listing three "questions presented" in their opening brief: (1) "Was the lower court's decision consistent with California's public airports preservation policy as set forth in . . . Section 21670(a)(1)(2)?"; (2) "Did the court below err in finding that the Butte County Supervisors made specific findings, as that term is used in . . . Section 21676(b)?"; and (3) "Did the Board rebut the statutory presumption that the [Commission] as a pubic

Section 21676, subdivision (b), provides that a city or county "may, after a public hearing, overrule the commission by a two-thirds vote of its governing body if it makes specific findings that the proposed action is consistent with the purposes of [the airport land use commission law] stated in Section 21670." Section 21670, subdivision (a) contains legislative declarations of policy and purpose that focus on minimizing noise and safety hazards caused by the operation of public use airports. (See *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1290 (*Coachella*).)

The Board's findings were sufficient to explicate that the proposal was consistent with the purposes stated in section 21670. The Board issued 10 pages of detailed findings, divided into four areas of concern related to land use near public airports: safety, overflight, noise, and airspace protection. The findings demonstrated that noise and safety hazards affecting the development were minimal or had been mitigated by a development agreement with the property owners.

The findings also were supported by substantial evidence. Each finding referred to relevant data, information, and

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[*sic*] agency acted lawfully and validly when it found the Stephens Project inconsistent with the Chico Municipal Airport Environs Plan?" Plaintiffs' issues number one and three are not suitable for review under Code of Civil Procedure section 1094.5 (see pp. 14-21, *post*), and are dealt with briefly in the sections on related cognizable contentions (see pp. 17, fn. 12 & 55-57, *post*).

guidelines, much of it taken from two sources prepared by professionals with expertise in airport land use planning: a state-published airport planning handbook and a federally-financed noise plan for the Chico Airport. This evidence is hearsay. But plaintiffs waived any evidentiary objection by failing to raise it when such evidence was presented to the Board. This failure is understandable given the liberal admissibility of evidence in administrative proceedings, as well as plaintiffs' own reliance on similar documentary evidence. In addition, courts have recognized that liberal admissibility of hearsay evidence in public hearings is important to an administrative process that relies upon less formality for efficient decisionmaking.

Additionally, we reverse the award to defendants Robert and Ann Stephens (the Stephenses) of the cost of transcribing Commission hearings on the proposed development of their property. The Stephenses claimed these costs were incurred in preparation of the administrative record, but the transcripts were not part of the record filed with the court. (Code Civ. Proc., § 1094.5, subd. (a).)

I. AIRPORT LAND USE COMMISSION LAW

To aid understanding of the legal environment in which this case arises, it is appropriate to review first the applicable provisions of the airport land use commission law (§ 21670 et seq.).

The airport land use commission law generally requires every county with a public airport to establish an airport land use commission. (§ 21670, subd. (b).) Each commission must prepare and adopt an airport land use plan that will provide for the orderly growth of the airport and the area surrounding it, and safeguard the welfare of the inhabitants near the airport and the public in general. (§§ 21674, subd. (b), 21675, subd. (a).) The commission establishes the boundaries of the airport plan. (§ 21675, subd. (c).) Within the planning area, the commission may, among other things, "specify use of land . . . ." (§ 21675, subd. (a).) The commission reviews the plan as often as necessary, but cannot amend it more than once a year. (§ 21675, subd. (a).)

An airport land use commission is authorized "[t]o review the plans, regulations, and other actions of local agencies and airport operators pursuant to Section 21676." (§ 21674, subd. (d).)

Section 21676 provides in relevant part: "Prior to the amendment of a general plan or specific plan, or the adoption or approval of a zoning ordinance or building regulation within the planning boundary established by the airport land use commission pursuant to Section 21675, the local agency[3] shall first refer

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3 The term "local agency" is not defined in the airport land use commission law. However, California's open meeting law defines "local agency" to mean a "county, city . . . city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency

the proposed action to the commission. If the commission determine that the proposed action is inconsistent with the commission's plan, the referring agency shall be notified. The local agency may, after a public hearing, overrule the commission by a two-thirds vote of its governing body *if it makes specific findings that the proposed action is consistent with the purposes of this article stated in Section 21670*." (§ 21676, subd. (b), italics added.)[4]

Section 21670 contains two legislative declarations: one concerning the public interest and the other setting forth the express purpose of the statute.

First, section 21670, subdivision (a)(1), provides: "It is in the public interest to provide for the orderly development of each public use airport in this state and the area surrounding these airports so as to promote the overall goals and objectives of the California airport noise standards adopted pursuant to

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thereof, or other local public agency." (Gov. Code, § 54951; see also Code Civ. Proc., § 1094.6, subd. (a) [judicial review of decision of local agency, as defined in Gov. Code, § 54951, may be by administrative mandamus, Code Civ. Proc., § 1094.5].)

[4] Plaintiffs occasionally refer to *section 21675.1, subdivision (d)*, as requiring the Board to make specific findings to overrule the Commission. However, section 21675.1, subdivision (d), governs review by an airport land use commission of a city or county action, regulation, or permit, *before* the commission has adopted a comprehensive land use plan. (See § 21675.1, subd. (b).) Since the Chico Airport Plan was adopted in 1978, section 21675.1 does not apply. Moreover, as the trial court remarked, the findings requirement for overruling a commission is the same in 21675.1, subdivision (d), as in section 21676, subdivision (b).

Section 21669 and to prevent the creation of new noise and safety problems."

Second, section 21670, subdivision (a)(2), provides: "It is the purpose of this article to protect public health, safety and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses."

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Administrative Proceedings

In July 1996, the Stephenses applied to Butte County for rezoning of a 300-acre tract of land they own adjacent to the Chico Airport to permit increased residential development (the Stephens Project).[5] After initial consideration and comment by county agencies and staff, the Stephenses submitted a revised proposal whose principal feature was the creation of a new zoning designation, "Planned Development," which would permit clustered development and could be combined with existing designations, such as "Open Space" (permitting natural,

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[5] We refer to the defendant owners of the property as the Stephenses, although they own the property through a trust. Plaintiffs in their pleadings named the Stephenses as defendants, and the trust answered, denying that the Stephenses were the owners. However, neither the trust nor the Stephenses ever sought dismissal on the ground of defect or misjoinder of parties. (Code Civ. Proc., § 430.10.) Moreover, the Stephenses recovered costs in the trial court in their own names, identifying themselves as the real parties in interest.

recreational, and other non-development uses) and "SR-1" (permitting one-acre minimum residential lots). The proposed zoning changes would allow construction of up to 160 single-family residences on the property.

On June 23, 1998, the Board held a hearing on the project and voted to direct county staff to work with the Stephenses on a development agreement.[6] The Board continued the hearing on the Stephens Project until the agreement was ready for consideration.

In the meantime, on August 18, 1998, the Commission considered the Stephens Project and found it consistent with the Chico Airport Plan. (See § 21676, subd. (b).) The Commission recommended, however, that a number of conditions related to land use be incorporated in the development agreement.

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[6] California's "development agreement statute [Gov. Code § 65864 et seq.] permits a city or county to 'enter into a development agreement' with any property owner 'for the development of the property.' (§ 65865, subd. (a).) In essence, the statute allows a city or county to freeze zoning and other land use regulation applicable to specified property to guarantee that a developer will not be affected by changes in the standards for government approval during the period of development. [Citations.]" (*Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, 226 (*Santa Margarita*); accord, *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 865.) "As provided by Government Code section 65865.2, a development agreement 'shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes.'" (*Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1214.)

The Commission also advised the Board that the Chico Airport Plan, adopted in 1978, was out-of-date and inadequate to address current and foreseeable noise, safety, and land use compatibility issues. The Commission's preferred course was to delay action on the proposal until an airport master plan and an updated land use plan had been completed.

On September 22, 1998, the Board passed a motion of intent to approve a development agreement for the Stephens Project, as revised to require compliance with the conditions recommended by the Commission. The Board directed staff to prepare findings necessary to approve the Stephens Project, including findings that it was consistent with the Chico Airport Plan.

On October 21, 1998, however, the Commission changed its position by amending the Chico Airport Plan to, among other things, establish an "Overflight Protection Zone." The Commission adopted the zone as a drawing created by overlaying airport safety zones depicted in Hodges & Shutt, Airport Land Use Planning Handbook (1993) (CalTrans Airport Handbook),[7] onto a map of the Chico Airport taken from P&D Aviation, 1995 FAR Part 150 Airport Noise Compatibility Program and Environs Plan for

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[7] The CalTrans Airport Handbook is published by the Division of Aeronautics of the California Department of Transportation (CalTrans). (§ 21674.7.) An airport land use commission is required to use information and data in the CalTrans Airport Handbook for guidance in formulating, adopting, or amending an airport land use plan. (§ 21674.7.) Counsel for plaintiffs has referred to the CalTrans Airport Handbook as "the 'planners' bible.'"

the Chico Airport, a federally-financed noise abatement plan (Chico Airport Noise Plan). (CalTrans Airport Handbook, *supra*, p. 9-16.) The text of the amendment that accompanied the drawing imposed various restrictions on development within the zone, including a prohibition on any new single-family residences.

The Commission also adopted a map setting out noise exposure levels in zones located at and in the vicinity of the Chico Airport. This map had been included in the 1978 version of the Chico Airport Plan, but only as a projection for the future.

In light of these amendments, the Board referred the Stephens Project back to the Commission, which, on November 18, 1998, determined that the project was inconsistent with the amended Chico Airport Plan.

The Commission made findings regarding "Overflight Protection" and "Safety" in reaching this conclusion. First, as to "Overflight Protection," the Commission found the proposal would permit construction of up to 160 single-family residences in the Overflight Protection Zone, where such new housing was prohibited. The Commission also noted that information from the Chico Airport tower indicated that a number of heavy military aircraft and air tankers made low altitude approaches near the project site, which could be annoying to residents. The Commission referred to the CalTrans Airport Handbook's statement

that the ideal strategy to address overflight annoyance is to avoid residential development in affected locations.

Second, as to "Safety," the Commission found that the project site was located in an area of elevated likelihood of aircraft accidents. This finding was based on two maps of accident location patterns, which the Commission also had adopted in amending the Chico Airport Plan. In a manner similar to the Overflight Protection Zone, the Commission created these maps by taking accident pattern maps from the CalTrans Airport Handbook and overlaying them on a map of the Chico Airport.

In addition, the Commission made two "Comments" about the consistency of the project with the amended Chico Airport Plan. First, under the heading "Noise," the Commission observed that the area of the project site would likely be exposed to "single event noise levels" from operations of forest firefighting air tankers, which would exceed levels acceptable for residential development. Second, the Commission noted that the prohibition on new single-family dwellings in the Overflight Protection Zone would ensure "to the fullest extent currently possible" against new land uses which might interfere with extension of the airport runways.

On December 1, 1998, after a public hearing, the Board voted four to zero to approve the Stephens Project. The Board's approval was subject to findings, among other things, overruling the Commission. These findings, derived from a December 1, 1998, agenda report prepared by county staff, were attached to

the Board's minutes, and consisted of more than 10, single-spaced pages, organized into the categories of safety, overflight, noise, and airspace protection. A copy of the Board's findings is attached as an Appendix, *post*. Each finding discussed the evidence on which it was based, and this and other evidence was expressly incorporated by reference into the administrative record.

B. Mandamus Proceeding

The Commission and two pilots' organizations[8] filed a petition and complaint (petition) in superior court against the Board and Butte County challenging the decision to overrule the Commission and approve the Stephens Project. The trial court held a hearing on the petition and issued a written decision denying the petition. The court reviewed the Commission's findings and the Board's findings overruling the Commission, and discussed the supporting evidence cited by the Board. The court concluded that the "Board did make specific findings, and did adequately address the issues raised by [the Commission]." The court further observed that it was "not in a position to decide that the County has made an unwise decision, but only whether the County has followed the required procedures, and exercised its discretion based upon evidence in the record."

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[8] Plaintiffs California Pilots Association and North Valley Pilots Association are nonprofit corporations dedicated to preserving, respectively, California airports and the Chico Airport.

The trial court entered judgment denying the petition and awarding unspecified costs to defendants. Plaintiffs appealed from the ruling denying the petition.[9]

Subsequently, the Stephenses submitted a memorandum of costs, seeking, among other things, court reporter fees for transcripts of the trial court hearing and of three Commission meetings. Plaintiffs filed a motion opposing the transcription costs, in part on the grounds that the court did not order the court hearing transcript, and the Commission meeting transcripts were not part of the administrative record. The court granted plaintiffs' motion as to the court hearing transcript, but otherwise denied it, and entered judgment for costs, including the Commission meeting transcripts, in favor of the Stephenses. Plaintiffs have appealed from that judgment, as well. We ordered plaintiffs' appeals consolidated.

III. DISCUSSION

A. Standard of Review

For expedience, we here state the standards of review applicable to plaintiffs' various contentions on appeal.

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[9] While plaintiffs should have appealed from the judgment (Code Civ. Proc., § 1094.5, subd. (g)), an appeal lies from an order denying a writ of mandate where, as here, the court intended no further action or orders on the petition, and the rights of the parties were finally determined by the order. (See *Silva v. Superior Court* (1993) 14 Cal.App.4th 562, 573; *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 56-57; *Daggs v. Personnel Commission* (1969) 1 Cal.App.3d 925, 930.) Since plaintiffs could have appealed from the ruling, it is not critical that they failed to appeal from the judgment.

1. *Abuse of Discretion under Code of Civil Procedure section 1094.5*

The parties agree that the Board's vote to overrule the Commission pursuant to section 21676 was an adjudicative administrative decision. (*California Aviation Council v. City of Ceres* (1992) 9 Cal.App.4th 1384, 1390-1392 (*California Aviation*).) Code of Civil Procedure section 1094.5 therefore governs judicial review of the Board's action. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514 (*Topanga*) [section 1094.5 is "the state's administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies"]; *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 111 (*Cadiz*) [same]; Code Civ. Proc., § 1094.6 [review of decision of local agency such as city or county, or any commission, board, officer, or agent may be pursuant to section 1094.5].) Section 1094.5 requires us to inquire whether the Board "has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).)

Plaintiffs have not contested the Board's jurisdiction or the fairness of the trial. We therefore review the Board's decision for prejudicial abuse of discretion. "Abuse of discretion is established if [the agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by

the evidence." (Code Civ. Proc., § 1094.5, subd. (b); *Topanga*, *supra*, 11 Cal.3d at p. 514-515; *Cadiz, supra,* 83 Cal.App.4th at p. 111.)

Here, plaintiffs contend the "Board erred in failing to make specific findings based on substantial evidence in the record as required by [section 21676, subdivision (b)]." Accordingly, we review the sufficiency of the Board's findings and their evidentiary support.

2. *Review of Findings*

Under Code of Civil Procedure section 1094.5, we review the Board's findings independently as a matter of law. (See *Miller v. Board of Supervisors* (1981) 122 Cal.App.3d 539, 543, fn. 3; cf. *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840 (*Sierra Club*), 849, fn. 2, 858-860.)

To be sufficient, the findings must meet the requirements of section 21676, subdivision (b), *and* the standards articulated by the Supreme Court in *Topanga, supra,* 11 Cal.3d 506. (See *Sierra Club, supra,* 28 Cal.3d at pp. 858-860; *California Aviation, supra,* 9 Cal.App.4th at p. 1395.) In *Topanga*, the Court said that "implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga, supra,* 11 Cal.3d at p. 515.) "Although the Board's findings '"need not be stated with the formality required in judicial proceedings" [citation], they nevertheless must expose the board's mode of

analysis to an extent sufficient to' enable the parties to the agency proceeding to determine whether and on what basis they should seek review, and to apprise the reviewing court of the basis for the board's action." (*Cadiz, supra,* 83 Cal.App.4th at p. 115, quoting, *Topanga, supra,* 11 Cal.3d at p. 517, fn. 16.) "[A] findings requirement serves to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." (*Topanga, supra,* 11 Cal.3d at p. 516.)

In sum, to meet the standards of section 21676 and *Topanga*, the findings must be fact specific and not merely declare a general conclusion. (*California Aviation, supra,* 9 Cal.App.4th at p. 1395.) They must link the proposal, the finding of consistency with section 21670 purposes, and the evidence in a manner that reveals "the analytic route" the Board traveled from evidence to action.[10] (*Topanga, supra,* 11 Cal.App.3d at p. 515; *California Aviation, supra,* 9 Cal.App.4th at p. 1395.)

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[10] Plaintiffs purport to advance as a separate contention that the "lower court's decision was not consistent with the state's strong and well established policy of preserving safe and efficient public airports in Butte County. Both the Board and the court failed to follow this policy as set forth in . . . Section 21670." Plaintiffs maintain that review of this question is de novo. It is sufficient to say that such an inquiry is subsumed within our review of the adequacy of the Board's findings, which must explicate that the Board's decision was consistent with the policy and purpose of the airport land

3. *Review of Evidence Where the Substantial Evidence Test Applies*

The scope of review of supporting evidence for abuse of discretion depends on whether or not the decision substantially affects a fundamental vested right (for example, the right to continued operation of one's business). (Code Civ. Proc., § 1094.5, subd. (c); *Cadiz, supra,* 83 Cal.App.4th at p. 111.) If a fundamental right is involved, the trial court exercises independent judgment to determine whether the *administrative* findings are supported by the weight of the evidence, and the appellate court considers whether the *court's* findings are supported by substantial evidence. (Code Civ. Proc., § 1094.5, subd. (c).) But the Board's decision to overrule the Commission does not involve fundamental rights. (*California Aviation, supra,* 9 Cal.App.4th at p. 1394 [fundamental rights not affected by decision to overrule airport land use commission and enact ordinance permitting residential construction near airport]; see also *Siller v. Bd. of Supervisors* (1962) 58 Cal.2d 479, 484 [no vested right is affected by the denial or granting of a zoning variance]; *Cadiz, supra,* 83 Cal.App.4th at p. 111 [courts have rarely applied independent judgment test to land use decisions]; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1212-1213 [no vested right to build a single-family residence]; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 334 (*Desmond*)

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use commission law as expressed in section 21670. (§ 21676, subd. (b).) Furthermore, as mentioned, we review the Board's decision, not the trial court's.

[applying substantial evidence standard to review of administrative denial of land use permit for second residential unit].)

Where no fundamental vested right is involved, a reviewing court applies the substantial evidence test to determine whether the *agency's* findings are supported by evidence in the record. (Code Civ. Proc., § 1094.5, subd. (c) [in all cases where the independent judgment test does not apply, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record"]; *California Aviation, supra,* 9 Cal.App.4th 1384, 1393.)[11]

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[11] Under the substantial evidence standard, the scope of our review as to both the sufficiency of findings and their evidentiary support is identical to the lower court's. (See *Miller v. Board of Supervisors, supra,* 122 Cal.App.3d 539, 543, fn. 3 ["Where . . . the trial court does not exercise its independent judgment as to the weight of the evidence, the appellate court is in the same position as the trial court to determine whether as a matter of law the board's findings are sufficient and whether substantial evidence supports those findings"]; *California Aviation, supra,* 9 Cal.App.4th 1384, 1393 ["If fundamental rights are not substantially affected, the trial court applies the substantial evidence rule in reviewing whether the agency's findings are supported by the evidence. [Citation.] The same standard is applied on appeal. [Citation.]"]; *Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 327 (*Dore*) ["Our role is to consider whether the administrative agency committed a prejudicial abuse of discretion by examining whether the findings support the agency's decision and whether substantial evidence supports the findings in light of the whole record"].)

To determine whether substantial evidence supports the Board's findings, "we must examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it . . . . [Citations.] For this purpose, 'substantial evidence has been defined in two ways: first, as evidence of "'"ponderable legal significance . . . reasonable in nature, credible, and of solid value"'" [citation]; and second, as "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" [Citation.]' [Citation.]" (*Desmond, supra,* 21 Cal.App.4th at p. 335; Code Civ. Proc., § 1094.5, subd. (c); see *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 585-586.)

This review involves some weighing of the evidence to fairly estimate its worth, but does not constitute independent judgment where the court substitutes its findings and inferences for that of the agency. It is for the agency to weigh the preponderance of conflicting evidence, "as we may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it". (*Kirkorowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 986; *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.)

Moreover, "the petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that

the agency regularly performed its official duty. When the standard of review is the substantial evidence test . . . it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. [Citations.] Thus, since the same standard of review applies now on appeal as it did in the trial court, the burden is on appellant to show there is no substantial evidence whatsoever to support the findings of the Board." (*Desmond, supra,* 21 Cal.App.4th at pp. 335-336; accord, *Saad v. City of Berkeley, supra,* 24 Cal.App.4th at p. 1212.)

Substantial evidence, however, "is not synonymous with any evidence." (*Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, 47.) Evidence irrelevant to the issues cannot support a finding. (See *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1137.)

Hearsay evidence is admissible in an administrative proceeding to explain or supplement other evidence but, if objected to, cannot be the sole support for a finding. (See *Steen v. Bd. of Civil Service Commrs.* (1945) 26 Cal.2d 716, 726-727 ["The general rule is that in the absence of a special statute an administrative agency cannot over objection make findings of fact supported solely by hearsay evidence" (italics added)]; *Fox v. S.F. Unified School Dist.* (1952) 111 Cal.App.2d 885, 891 ["in an adversary hearing, hearsay, properly objected to, is insufficient alone to support a finding, if that hearsay would be inadmissible in a civil action"]; see also Gov. Code, §

11513, subd. (d);[12] *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1970) 8 Cal.App.3d 1009, 1019-1020; *Borror v. Dept. of Investment* (1971) 15 Cal.App.3d 531, 546; *Savelli v. Bd. of Medical Examiners* (1964) 229 Cal.App.2d 124, 139-140; but see *Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 583 (*Martin*).)[13]

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[12] Section 11513, subdivision (d), of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) (APA), provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." (Gov. Code, § 11513, subd. (d).) However, the APA generally does not apply to proceedings by local agencies, such as counties and their governing boards. (Gov. Code, § 11410.30.)

[13] In *Martin*, this court rejected the position of other appellate courts in California that substantial evidence in support of a finding could consist solely of hearsay if received without objection in an administrative proceeding. (*Martin, supra,* 26 Cal.App.3d 573, 583.) To reach this conclusion, we relied on former Government Code section 11513, subdivision (c), which (unlike the present version, section 11513, subd. (d)) said "nothing about hearsay objections" (*id.*), but did unambiguously provide that inadmissible hearsay "'shall not be sufficient in itself to support a finding.'" (*Id.* at p. 583.) We also distinguished contrary authority where the proceedings were not governed by Government Code section 11513. (*Id.* at p. 580.) *Martin* thus does not state current law in the APA context and is inapplicable in non-APA cases. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 556, fn. 14 [in a case involving membership in an orthodontists' society, the Supreme Court distinguished *Martin* because it "involved an administrative proceeding governed by Government Code section 11513, and is not applicable here"]; see also *Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd.* (1984) 153 Cal.App.3d 262, 270 & fn. 5 [holding that unobjected-

4. *Review Is Not Used to Control Discretion*

As did the superior court, we emphasize that our review is not designed to rectify an imprudent decision by the Board. Mandamus cannot be used to control the discretion of an administrative body, only to ensure that it was not abused. (Code Civ. Proc., § 1094.5, subd. (f); *Kaiser Foundation Hospitals v. Belshe* (1997) 54 Cal.App.4th 1547, 1558 [under traditional or administrative mandamus principles, "[a] writ cannot be used to control a matter of discretion"]; *Dore, supra,* 23 Cal.App.4th at pp. 326-327 ["Because the administrative agency has technical expertise to aid it in arriving at its decision, we should not interfere with the discretionary judgments made by the agency"].) In a land use case, the Supreme Court said that "'[c]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible. . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.'" (*Lindell Co. v. Bd. of Permit Appeals* (1943) 23 Cal.2d 303, 315; see also *Better Alternatives for Neighborhoods v. Heyman* (1989) 212 Cal.App.3d 663, 672 [affirming university's decision to approve student

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to hearsay is sufficient to support "a finding in a California judicial proceeding" and thus constitutes substantial evidence in a non-APA proceeding, despite split in authority in APA context]; but see *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 [hearsay charges received by city council without apparent objection not substantial evidence to support license revocation], overruled on other grounds, *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37.)

housing project, court was guided by principle that "'[i]n determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the administrative board [citation], and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld [citation].' [Citation.]"].)

Keeping these principles and limitations in mind, we consider whether the Board abused its discretion in overruling the Commission.

B. *Sufficiency of the Board's Findings*

1. *The Purposes of Section 21670*

As the court observed in *Coachella,* the core concerns expressed in the legislative declarations of public interest and purpose in section 21670, subdivision (a), are "the minimization of noise and safety hazards caused by the operation of public use airports . . . ." (*Coachella, supra,* 210 Cal.App.3d 1277, 1290; see also CalTrans Airport Handbook, *supra,* p. 3-1 ["airport land use compatibility concerns . . . fall under two broad headings identified in state law: noise and safety"].)

Plaintiffs, however, argue that the "Board was constrained to make specific findings based on evidence in the record as to *each of the five elements*" (italics added), of section 21670, but did not. According to plaintiffs, "the Board failed to make specific findings based on evidence in the record that the project would:

"a) prevent the creation of new noise problems;

"b) prevent the creation of new safety problems;

"c) provide for orderly development of the Chico Municipal Airport;

"d) promote the overall goals and objectives of the California airport noise standards adopted pursuant to Section 21699; [and]

"e) minimize the public's exposure to excessive noise and safety hazards within and around Chico Municipal Airport."

We reject this argument for a number of reasons.

First, it is not clear that there are five separate purposes or "elements" in section 21670 or that plaintiffs have stated them correctly. We note that, at one point, plaintiffs refer to the "*six* elements encompassed in . . . Section 21670 . . . ." (Italics added.) In addition, while the CalTrans Airport Handbook identifies five purposes in section 21670, subdivision (a), it states them differently from plaintiffs and attempts to articulate such purposes by parsing the statutory language. (CalTrans Airport Handbook, *supra,* p. 5-15 to 5-17.)

Second, to the extent section 21670 states separate purposes, they are plainly interrelated, sharing a core concept of minimizing noise and safety hazards on land in the vicinity of public airports. (See *Coachella, supra,* 210 Cal.App.3d 1277, 1290.)

Third, a legislative declaration prefacing a statute functions poorly as a checklist of specific findings, because it is intended to state the *general* purposes of the law. (See 1A

Sutherland, Statutory Construction (5th ed. 1993) § 20.12, p. 97 ["In place of a preamble, it has become common . . . to include a policy section which states the general objectives of the act so that administrators and courts may know its purposes"].)

Fourth, nothing in section 21676 mandates that the purposes stated in section 21670 be addressed point-by-point, rather than collectively. (Cf. CalTrans Airport Handbook, *supra,* at p. 5-15 ["[a]lthough findings do not need to address each of these purposes point by point, it is essential that, collectively, all of the purposes be addressed"].)[14]

Fifth, section 21676, subdivision (b), does not prescribe particular findings a local agency must make beyond the general requirement of consistency with the purposes stated in section 21670.

Sixth, noting that the CalTrans Airport Handbook "identifies four functional categories for determining airport land use compatibility: Safety, Overflight, Noise and Airspace Protection," the Board made specific findings in each category to demonstrate that the Stephens Project would be consistent with the purposes stated in section 21670. (See CalTrans Airport Handbook, *supra,* p. 3-1 to 3-2.) We discern nothing in

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[14] The CalTrans Airport Handbook includes an outline of suggested findings, but emphasizes that these are offered only as "*possible* approaches to demonstrating a proposed action would indeed be consistent with [section 21670, subdivision (a)] purposes." (CalTrans Airport Handbook, *supra,* at p. 5-15, italics added.)

section 21676 or section 21670 that precludes this approach to fulfilling the findings requirement for overruling an airport land use commission. In fact, the Commission fostered the adoption of this approach when it made express findings in two of these categories (overflight and safety), and commented on another (noise), in determining that the Stephens Project was *inconsistent* with the amended Chico Airport Plan.

Accordingly, we decline to limit the flexibility of local governments in overruling an airport land use commission pursuant to section 21676, by dividing section 21670 into multiple elements and requiring findings as to each.

2. *Specific Findings Addressing Safety, Overflight, Noise, and Airspace Protection Concerns*

The Board concluded its findings fulfilled the requirements of 21676 by demonstrating the Stephens Project's consistency with the purposes stated in section 21670. We agree. As detailed below, the Board made specific findings, based on the CalTrans compatibility categories, that cited and analyzed evidence to explain that the proposal would minimize airport noise and safety hazards to inhabitants of the development. Such findings were sufficient under the language of section 21676 and the standards articulated in *Topanga.*

a. Safety and Overflight

Combining its findings on safety and overflight concerns, the Board concluded that a complete prohibition on residential development on the Stephenses' property within the Overflight

Protection Zone was unnecessary to protect public health, safety, and welfare, and the viability of aircraft operations.

First, the Board observed that the majority of the Stephens Project was located within the Inner Turning Zone and Traffic Pattern component safety zones of the Overflight Protection Zone. As to the Inner Turning Zone, the Board cited the CalTrans Airport Handbook's recommendation that residential development in that zone be limited to lots between two and 10 acres. (CalTrans Airport Handbook, *supra*, p. 9-22) The Board noted the development agreement incorporated a condition--recommended by the Commission when it approved the project--of no more than one dwelling unit per two acres in the portion of the project located within the Inner Turning Zone.

Second, the Board found the Stephens Project was consistent with section 21670 purposes, because only six residences per acre would be permitted in the portion of the project located in the Traffic Pattern Zone. The Board cited the CalTrans Airport Handbook's statement that the potential for accidents is low in this zone and need for land use restrictions minimal; only large assemblies of people (150 or more per acre) need to be avoided; typical residential subdivision densities of four to six dwelling units per acre are acceptable from a safety perspective; and even higher densities are acceptable if development is clustered to provide open space. (CalTrans Airport Handbook, *supra*, at p. 9-23) The Board again noted that the development agreement incorporates one of the Commission's

initial recommendations: that residential densities within the Traffic Pattern Zone not exceed six units per acre.

Third, the Board found the proposed rezoning of the property required clustering of dwellings, variable lot sizes, and open space retention that exceeded the percentages recommended by the CalTrans Airport Handbook, thus making residential development more compatible with the Chico Airport than the previous zoning. The Board observed the development agreement incorporated a new combined open space and planned development zone, which required a minimum of 25 percent open space and different sizes of residential lot sizes, including clustering of dwelling units. The Board cited the CalTrans Airport Handbook's recommendation of clustering and open space in all safety zones to allow a greater amount of open space for a pilot to make a forced landing (according to the handbook, the majority of airport accidents). (CalTrans Airport Handbook, *supra,* at pp. 9-24 to 9-25.) The 25 percent open space required by the development agreement exceeded the open space percentages recommended in the handbook (ranging from 10 percent to 20 percent, depending on the component zone involved). (CalTrans Airport Handbook, *supra,* at p. 9-27.)[15] The Board also observed

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[15] The CalTrans Airport Handbook discusses the value of clustering and open space in a section devoted to safety of *people and property on the ground*, but specifies the percentage of open space recommended in a section on the safety of *aircraft occupants*. (*Id.* at pp. 9-24 to 9-27.) The safety on the ground section, however, does not give percentages of open space recommended for particular zones.

that the percentages of open space recommended by the CalTrans Airport Handbook were based on the same accident pattern maps adopted by the Commission in amending the Chico Airport Plan. (CalTrans Airport Handbook, *supra*, pp. 8-27 to 8-40, 9-26.)

Fourth, the Board found that the likelihood of an aircraft accident involving any particular residential dwelling represented an exceptionally low risk. The Board cited CalTrans Airport Handbook data demonstrating that the chance of all aircraft accidents in the Inner Turning Zone and Traffic Pattern Zone for runways of 6,000 feet or more (such as at the Chico Airport) is minimal, respectively, .02 percent and .03 percent per acre. (CalTrans Airport Handbook, *supra*, at p. 9-17.)

Fifth, the Board found that the prohibition on single-family residences within the Overflight Protection Zone was unnecessary, because the development agreement incorporated the Commission's recommendation of the use of "buyer awareness measures." The Board first observed that the Commission's determination that residential development should be prohibited in the zone was based on: (1) the Commission's reference to unquantified information from the Chico Airport tower about low altitude approaches by heavy aircraft; and (2) the CalTrans Airport Handbook's recommendation that the ideal strategy was to avoid residential development in areas affected by overflight annoyance. But the Board cited the handbook's statement that avoiding residential development affected by overflights is not always practical. (CalTrans Airport Handbook, *supra*, p. 3-9.)

The alternative the handbook recommended was to adopt measures to make buyers aware of the airport's proximity, such as overflight easements, recorded deed notices, and real estate disclosure statements. (CalTrans Airport Handbook, *supra,* p. 3-9.) The Board noted that the development agreement required all three of these measures, once again as initially recommended by the Commission. (CalTrans Airport Handbook, *supra,* p. 3-9.)

Finally, the Board found that safety or overflight concerns did not pose a threat to firefighting air tanker operations, based on a letter from Gary F. Ross, Unit Chief, Butte Ranger Unit, Butte County Fire Department and California Department of Forestry. The letter stated these agencies found no potential negative impact from the Stephens Project, because the planned development was located on a portion of the property away from the airport and left 103 acres as open space adjacent the airport. The letter further stated that residential density on the remainder of the property would increase only marginally.

Based on the CalTrans Airport Handbook and the Ross letter, the Board concluded that the Overflight Protection Zone was unnecessary to protect the public or aircraft operations at the Chico Airport, and that the development agreement already included several significant land use measures to minimize the public's exposure to excessive safety (and noise) hazards, in compliance with sections 21676 and 21670.

These findings were sufficient to link the Stephens Project (subject to the land use conditions in the development

agreement), the Board's conclusion that the proposal was consistent with section 21670 purposes of minimization of safety hazards from airport operations, and the evidence relating to safety and overflight concerns affecting the Stephens Project (e.g., the Commission's Overflight Protection Zone map, the CalTrans Airport Handbook, the Ross letter), in a manner that revealed the "analytic route" the Board followed in reaching its conclusion. (See *Topanga, supra,* 11 Cal.3d at p. 515; *California Aviation, supra,* 9 Cal.App.4th at p. 1395.)

b. Noise

In the category of noise, the Board found that, according to the Chico Airport Noise Plan, the maximum amount of noise to which any portion of the Stephens Project would be exposed is a community noise equivalent level (CNEL) of 60 decibels, even as projected to the year 2010.[16] We note that this sound level demonstrates consistency with the public's interest, as declared in section 21670, subdivision (a)(1), in "orderly development of . . . the area surrounding [airports] so as to promote the overall goals and objectives of the California airport noise standards adopted pursuant to Section 21669 . . . ." Section 21669 requires CalTrans to adopt noise standards for aircraft at

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[16] The daily "[c]ommunity noise equivalent level, in decibels, represents the average daytime noise level during a 24-hour day, adjusted to an equivalent level to account for the tolerance of people to noise during evening and night time periods relative to the daytime period." (Cal. Code Regs., tit. 21, § 5001, subd. (f).)

airports based on "the level of noise acceptable to a reasonable person residing in the vicinity of the airport." The department has established that standard to be "a community noise equivalent level of 65 decibels." (Cal. Code Regs., tit. 21, § 5012; see also Cal. Code Regs., tit. 21, § 5006.) The Board observed that the Chico Airport Plan also states that the general plans of the City of Chico and Butte County set forth a maximum exterior level for residential use at 65 decibels.

The Board's finding as to noise included a lengthy discussion of the process whereby the levels in the Chico Airport Plan noise map, created as a projection in 1978 and adopted as current by the Commission in amending the plan in 1998, had been revised downward in subsequent years. The aviation consultants who prepared the Chico Airport Noise Plan in 1995 also prepared an "Aviation Activity Forecast" as part of a 1992 Aircraft Noise Exposure Map Report. Based on the actual growth of aircraft operations at the Chico Airport since 1978, this forecast for the year 2010 projected 31 percent less aircraft activity than as projected in the Chico Airport Plan. That being the case, the Board relied on the "more current and more precise data" in the Chico Airport Noise Plan and the Aviation Activity Forecast to conclude that "even with future [airport] growth scenarios" the Stephens Project would be noise compatible with the Chico Airport.

The Board further found that the likelihood of "single-event noise" (as opposed to cumulative measures of many events,

i.e., CNEL, see CalTrans Airport Handbook, *supra,* p. 6-6), presented no more than minimal public exposure to noise, even at extreme 90 to 100 decibel outdoor ranges to which people might be exposed during summer months with open windows at nighttime. The Board noted the Commission's comment that the Stephens Project was likely to be exposed to excessive single-event noise levels from air tanker operations during fire season, occasional military operations, and aircraft businesses running engines at night for maintenance and testing. The Board observed that no evidence was presented to the Board, nor had any been cited by the Commission, giving known or estimated decibel levels for single events at the Chico Airport.

The Board, however, cited a discussion of "Sleep Disturbance" in the CalTrans Airport Handbook which referred to a British study finding that an average person has only one in 75 chances of being awakened by aircraft noise in the outdoor range of 90 to 100 decibels. (CalTrans Airport Handbook, *supra,* p. 6-27.) Allowing for noise reduction from a building structure, this data indicated that indoor single-event levels of 70 to 80 decibels will cause less than a 2 percent chance of sleep disturbance. (*Ibid.*)

The Board also reported testimonial support for its finding that noise was not a problem at the Chico Airport. The Board described testimony at Commission hearings by Robert Koch, a Commission member representing the City of Chico, that the City had experienced minimal if any complaints regarding single-

event, or any other, noise levels generated by the Chico Airport. The Board noted that another Commission member, Norman Rosene, stated that no noise study data existed to support the conclusion that single-event noise at the Chico Airport exposed the public to the hazard of excessive noise. Lastly, a Commission staff member, Laura Webster, stated she was unaware of whether the CalTrans or any expert in the field had established a standard for single-event noise.

Finally, the Board found that the development agreement required noise-reduction construction and design of the residences in the Stephens Project, which would ensure that noise levels, including single-event noise levels, would remain within acceptable limits. The Board noted that the Chico Airport Plan stated that residential noise levels of 60 decibels were normally acceptable, but 70 decibels were acceptable if noise reduction features were included in construction and design of residential development. Incorporating another initial Commission recommendation, the development agreement required design and construction to achieve an interior noise level of no more than 45 decibels.

These findings were sufficient to link the Stephens Project, the Board's conclusion that the proposal was consistent with the section 21670 purposes of minimization of noise hazards from airport operations, and the evidence related to noise concerns (e.g., the noise map adopted in the amended Chico Airport Plan, the Chico Airport Noise Plan, the CalTrans Airport

Handbook, and the testimony of Commission members and a staff member), in a manner that revealed the "analytic route" the Board followed in reaching its conclusion. (See *Topanga, supra,* 11 Cal.App.3d at p. 515; *California Aviation, supra,* 9 Cal.App.4th at p. 1395.)

c. Airspace Protection

Lastly, the Board found that the Stephens Project did not cause a significant risk to airspace protection.[17] The Board cited the CalTrans Airport Handbook's statement that the airspace protection category concerns obstructions and land use characteristics that pose potential hazards by attracting birds or creating visual or electronic interference with air navigation. (CalTrans Airport Handbook, *supra,* at pp. 3-7 to 3-8.) The Board cited the handbook's suggestion of limiting the height of structures, antennas, and trees to avoid airspace obstructions, and limiting uses that may attract birds or interfere with air navigation. (CalTrans Airport Handbook, *supra,* at pp. 3-7 to 3-8.) The Board observed that single-family residences by their nature and existing design standards generally are limited to heights below 35 feet. The Board noted there was no evidence presented of any other potential hazard to airspace protection. The Board concluded that airspace

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[17] The Commission did not discuss airspace protection in its determination that the Stephens Project was inconsistent with the amended Chico Airport Plan. Nonetheless, the Board chose to address all four categories of airport land use compatibility concerns.

obstruction and interference with air navigation are hazards that would not normally be expected from single-family residential development.

Plaintiffs do not contend that the Board's airspace protection findings were insufficient under sections 21670 and 21676 and *Topanga*. Rather, plaintiffs disclaim the relevance of this finding, stating (as mentioned) that "[w]hile airspace protection is an important element [in] airport land use compatibility planning, in the instant case noise and safety for persons working and living in the project area are the main compatibility concerns." In light of this assertion, we need not review the sufficiency of this finding. (Cf. 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 597, p. 631.)

3. *Plaintiffs' Contention that the Board's Findings Were Conclusory*

Despite the detailed findings discussed above, plaintiffs contend the Board's findings were insufficient under *Topanga*, because "the Board's purported findings contained the conclusion" that the Board had fulfilled the requirements of sections 21670 and 21676, and "[t]his conclusion was unsupported by findings and was of no legal significance."

This contention borders on the frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Plaintiffs assert the Board's findings are conclusory only because they discuss the Board's concluding paragraph, as if it were not preceded by the 10 pages of specific findings that we have just discussed. Based on this feat of compartmentalization,

plaintiffs argue that this case is "remarkably similar" to *California Aviation.* In *California Aviation*, the Court of Appeal held that a city council's findings overruling an airport commission were insufficient, because they consisted *solely* of a sentence in a zoning ordinance that residential development on land near an airport was "'consistent with the purposes identified in [section 21670], in that the proposed land uses will minimize the public's exposure to excessive noise and safety hazards within the area around the Modesto City County Airport to the extent that the areas are not already devoted to incompatible uses.'" (*California Aviation, supra,* 9 Cal.App.4th 1384, 1395.) In other words, the findings before the court in *California Aviation* consisted of no more than a conclusion reciting the language of the statute and were devoid of any analysis of the evidence presented.

The *California Aviation* court said these findings "fall far short of the mark" set by *Topanga*, because "[r]eference is made to the purposes of section 21670, and then it is concluded the land uses minimize public exposure to excessive noise and safety hazards in the airport area. However, the critical links between the proposal, the finding, and the facts (raw evidence) are not presented as required under *Topanga*." (*California Aviation, supra,* 9 Cal.App.4th 1384, 1395.)

In fact, in *California Aviation*, there was *no* administrative record filed with the trial court or provided to the appellate court. (*California Aviation, supra,* 9

Cal.App.4th. 1384, 1394.) The record consisted of the ordinance and two letters (one authored by plaintiffs' counsel in this case). (*Ibid.*) Although the ordinance adopted and incorporated by reference a "Statement of Overriding Considerations," said to be attached to the ordinance, this item was not filed with the court. (*Id.* at pp. 1394, 1400.)

Thus, the holding of *California Aviation* has little application where the administrative record is extensive and contains detailed findings. So said the court in *Dore, supra,* 23 Cal.App.4th at p. 329, which rejected *California Aviation* as "inapposite" because, unlike that case (and this), "[n]either the trial court nor the appellate court had the benefit of the administrative record before it because it was never filed. [Citation.] Under those circumstances, the court of appeal in *Aviation* appropriately rejected the bare findings which, unlike the instant case, did not refer to factual information presented before the administrative bodies." (*Dore, supra,* 23 Cal.App.4th at p. 329.)

4. *Plaintiffs' Contention that the Board's Findings Were Invalidly Incorporated by Reference from a Staff Report*

Plaintiffs contend the Board's findings were invalid because "[i]nstead of making findings based on evidence to support the Stephens project [*sic*] action, the Board purported to incorporate by reference findings from an earlier action

related to the North Chico Specific Plan."[18] This is another borderline frivolous argument, at variance with any reasonable understanding of the Board's action.

The motion carried by the Board was recorded in the minutes in relevant part as follows: "I Move Approval of the Project Subject to Environmental Findings, General Plan Consistency Findings, Airport Consistency\Overriding Findings, and Development Agreement Findings as Amended from the Staff Report Dated December 1, 1998 **(Detailed Findings Set Forth and Included as Attachment "A" to These Minutes.**)"

As stated in the minutes, a staff report prepared for the hearing included "recommended findings" required to overrule (or "override"; see CalTrans Airport Handbook, *supra,* at p. 5-13) the Commission. Contrary to plaintiffs' argument, the Board could have met the findings requirement simply by incorporating by reference the factual findings of this staff report. (See *Dore, supra,* 23 Cal.App.4th at p. 328 ["The board's findings, which incorporate the factual findings stated in staff reports, satisfy the requirements set forth in *Topanga*"].)

However, the Board expressly stated, and the record discloses, that "Detailed Findings" were attached to and thus made part of the minutes memorializing its decision to approve the project and overrule the Commission. These findings

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[18] Apparently, in 1995 the Board overruled the Commission's determination that an amendment to the North Chico Specific Plan was inconsistent with the Chico Airport Plan.

contained fact-specific analysis of characteristics of the *Stephens Project*, but do not even mention the *North Chico Specific Plan*, beyond the consideration that the rezoning sought by the Stephenses required amendment of the plan. (See Gov. Code, § 65451, subd. (a)(1); see Appendix, *post*.)

In truth, we find plaintiffs' argument difficult to follow because their brief improperly refers to events and includes quotations without citation to the record. (See Cal. Rules of Court, rule 14(a).) But what few citations plaintiffs provide are to a different set of findings than those made in overruling the Commission. As mentioned, the Board made multiple findings, including both airport "Consistency" and "Overriding" findings. This double-barreled approach stemmed from the Board's uncertainty whether the Commission's 11th-hour amendment of the Chico Airport Plan was legally valid. Plaintiffs cite the "consistency" findings, not the "overruling" findings, as containing an invalid incorporation of unrelated material. Since we are not called upon to review the findings to which plaintiffs object, any defect in them is immaterial. We review only the findings the Board expressly made to support its decision to overrule the Commission. (Cf. *California Aviation, supra,* 9 Cal.App.4th at p. 1394.)

C. *Substantial Evidence Supporting the Board's Findings*

Plaintiffs contend that the Board did not "Identify Substantial Evidence in the Record to Support its Decision that the Stephens Project Would Not Cause a Noise Problem or Create a

Safety Hazard." Plaintiffs acknowledge that the Board's "purported relevant evidence is offered" in the findings attached to the Board's minutes, but contend that the items of evidence referenced therein are irrelevant to the issues or hearsay, or both.[19] We reject these contentions.

1. *Relevance of the Evidence*

Much of the evidence upon which the Board relied consisted of data, information, and guidelines from expert sources, such as the CalTrans Airport Handbook, which would appear indisputably relevant to most issues of land use in the vicinity of airports. Evidence is relevant if "'[s]uch evidence, in the light of logic, reason, experience, or common sense, has, by reasonable inference, a tendency to prove or disprove [a] disputed fact'" of consequence in the matter. (*People v. Hill* (1992) 3 Cal.4th 959, 987-988, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; Evid. Code, § 210.) Remarkably, however, plaintiffs argue that the handbook is irrelevant.

Plaintiffs, for example, assert that, in the Board's findings on safety and overflight, "[r]eference is made to the CalTrans Handbook but no substantial evidence is presented to

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[19] We detailed the specific evidence on which the Board based its findings in our review of the findings (*ante*, pp. 26-38). Although defendants repeat this exercise to demonstrate that the findings were supported by substantial evidence, we see no need to do so, because plaintiffs do not challenge any particular evidentiary item as insufficient to support any particular finding.

show the relationship of this publication to the six elements encompassed in . . . Section 21670, nor in what manner the project would be in compliance with . . . Section 21670 if guidelines contained in the Handbook were observed or implemented."

This contention is disingenuous. In the letter to the Board where plaintiffs' counsel referred to the CalTrans Airport Handbook as the "'planner's bible,'" he also stated that "[t]here is concern that the [Stephens Project] as planned may not be consistent with state policy as set forth in [section 21670, subd. (a)(1), (2)]. Guidance in achieving consistence with state policy is provided" in the CalTrans Airport Handbook.

Moreover, the relevance of the handbook is highlighted by the Commission's express reliance on it in considering the Stephens Project. When the Commission initially found the project consistent with the Chico Airport Plan, many of the conditions the Commission recommended that the development agreement incorporate were taken directly from the CalTrans Airport Handbook. The Commission also expressly relied on the handbook to support its findings that Stephens Project was inconsistent with the amended Chico Airport Plan, stating that "[d]ata supporting the [Commission's] findings have been generated from studies and reports prepared by recognized professionals and agencies with expertise in Airport Land Use Planning and land use compatibility." It cannot be that data, information, and guidelines in the CalTrans Airport Handbook

were relevant to noise and safety concerns at the Stephens Project when addressed by the Commission, but not by the Board.

Similarly, plaintiffs contend that the Chico Airport Noise Plan "does not address the Stephens project" and "is not fact specific and has only collateral relevance to the [noise] issue before the Court."[20] To the contrary, the plan contains data and estimates concerning the level of noise exposure *at the site of the Stephens Project* through the year 2010. (See Appendix, *post*.) Beyond this, plaintiffs' contention that the Chico Airport Noise Plan is not "fact specific" does not state a valid objection. Evidence need not be specific to the fact proven to be relevant. "As long as proffered evidence is reasonably susceptible to a relevant inference, it is relevant and admissible, even though it also is reasonably susceptible to an inference that is of no consequence to determination of the action. To be relevant, an item of evidence need not point exclusively to proof of a disputed fact in the action." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2002) Relevancy, § 21.24, p. 309.) In other words, that data, information, and guidelines in the CalTrans Airport Handbook would tend to prove a fact regarding noise or safety hazards at the Modesto Airport, does not make this evidence irrelevant to conditions at the Chico Airport.

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[20] Plaintiffs make the same objections to the Aviation Activity Forecast.

Plaintiffs also contest the relevance of the letter from Unit Chief Ross to "noise problems and safety hazards to persons on the ground who would be living and working at the project site." We disagree. The letter imparts the information that the Stephens Project increases residential density on a portion of the property located away from the airport, leaves substantial open space adjacent the airport, and only marginally increases residential density elsewhere. All three of these circumstances are relevant to whether the project minimizes noise and safety hazards to inhabitants of the proposed residences. Although the letter focuses on the project's potential interference with air tanker operations, such interference would result only if people living in the project objected that such operations exposed them to noise and safety hazards.

Finally, plaintiffs argue that the "record contains several letters both opposing and supporting approval of the project on grounds other than noise or safety" which are "irrelevant to the issue before the Court, namely, would the project be consistent with purposes set forth in" section 21670. Plaintiffs cite a group of documents that includes a November 30, 1998, letter to the Board from Michael R. McClintock on behalf of P&D Aviation, a firm whose predecessor prepared the Chico Airport Plan in 1978. McClintock also was involved in preparation of the Chico Airport Noise Plan. Although the Board did not refer to the McClintock letter in any particular finding, the Board expressly

made it part of the administrative record of the decision to approve the Stephens Project. As mentioned, we review the entire record in determining whether substantial evidence supports the Board's findings. (*Desmond, supra,* 21 Cal.App.4th at p. 335; Code Civ. Proc., § 1094.5, subd. (c).)

McClintock's letter is plainly relevant to noise and safety hazards affecting the Stephens Project. He verified that 1978 assumptions regarding noise levels near the Chico Airport were no longer valid, in part because "carrier service at the airport underwent a significant change, with commuter airlines replacing the major air carriers and substituting smaller turboprop commuter aircraft for the larger [and noisier] turbojet air carrier aircraft." McClintock reiterated that, according to the 1995 Chico Airport Noise Plan, "the portion of the Stephen's [*sic*] project proposed for development will be *outside* the CNEL *55dB* noise contour." He further observed that the Chico Airport Noise Plan addressed single-event noise and concluded (based on standards, criteria, and information set forth in the plan) that there were no serious or long-term effects from single-event noise as a result of existing or projected aviation activity at Chico Airport.

He also noted that the Board's findings showed "the proposed project is fully compatible with the [CalTrans Airport Handbook] criteria, or includes design changes (mitigation) to ensure such compatibility. As a result, the project is in

conformance with the Handbook's recommended Safety, Noise, Overflight and Airspace Protection Guidelines."

McClintock concluded that, in light of the evidence, and "based on its extensive understanding of the noise and land use compatibility issues at the Chico Municipal Airport, P&D Aviation believes that with implementation of the mitigation measures and development conditions proposed by the applicant for this project, the project would not be incompatible with existing and future aircraft operations at Chico Municipal Airport."

The McClintock letter constituted the opinion of an expert (whose qualifications plaintiffs have not challenged, see Evid. Code, § 720) directly relevant to noise and safety concerns at the Chico Airport.

We conclude that the handbook, noise plan, and correspondence cited by the Board in its findings constitutes "'"'relevant evidence that a reasonable mind might accept as adequate to support a conclusion'" [Citation.]' [Citation]." (*Desmond, supra,* 21 Cal.App.4th at p. 335.)

2. *Hearsay*

Plaintiffs contend the Board's findings are not supported by substantial evidence, because the Chico Airport Noise Plan, for example, "can be give[n] no greater weight than hearsay." In fact, all of the documentary evidence cited by the Board in support of its findings could be characterized as hearsay, if strictly defined. (See Evid. Code, § 1200.)

However, there is no indication in the record that any objection to the admissibility of evidence submitted to, or considered by the Board, was ever made, on the ground that it consisted of hearsay. Counsel for plaintiffs apparently did not attend the hearing on December 1, 1998, but did write two letters to the Board in the course of its consideration of the Stephens Project. In one, he specifically objected to the recommended findings that the Board ultimately adopted, asserting in part that "[s]elected out-of-context references to the [CalTrans Airport Handbook], reports, documents and other publications are incomplete and misleading." In neither letter did counsel make any mention of the admissibility of any evidence before the Board, let alone raise a specific hearsay objection. Likewise, the petition does not contain any allegation or suggestion that the Board had improperly considered hearsay evidence in approving the Stephens Project, nor did plaintiffs raise such an objection in their brief filed in support of mandamus or at oral argument before the trial court.

Plaintiffs' hearsay objection is therefore waived. It is fundamental that "[c]ounsel should make objections to evidence at the administrative hearing to enable the agency to make a correct ruling on the point. . . . [¶] . . . Failure to make the appropriate objection at the hearing constitutes a waiver of the defect, and the error may not be challenged on judicial review." (Cal. Administrative Hearing Practice (Cont.Ed.Bar 2d

ed. 2002) Hearing Process, § 7.96, p. 381, citing, inter alia, *Tennant v. Civil Service Com.* (1946) 77 Cal.App.2d 489, 498-499 [waiver of objections in an administrative mandamus action to unsworn testimony, investigative report read but not introduced as evidence, and interview transcript, not objected to at administrative hearing]; accord, *Rinaldo v. Bd. of Medical Examiners* (1947) 82 Cal.App.2d 213, 216.)

Moreover, as defendants point out, liberal admissibility of evidence is favored in administrative proceedings. "Indeed, it is well established that 'a presentation to an administrative agency may properly include evidence that would not be admissible in a court of law.'" (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 294, quoting *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 823; see also *Floresta, Inc. v. City Council of City of San Leandro* (1961) 190 Cal.App.2d 599, 608 [substantial evidence supporting an administrative determination could consist of "opinion testimony [which] would neither have been admissible in a court of law nor have served as a proper basis for its decision, but such rules of admissibility do not bind administrative agencies"]; *Traxler v. Bd. of Medical Examiners* (1933) 135 Cal.App. 37, 40 [rejecting claim that in revoking plaintiff's medical certificate the Board of Medical Examiners "based its decision solely on improper evidence which it admitted," the court observed "that proceedings of this character are not governed by the strict rules of evidence or procedure that obtain in court

trials"]; but see *Jenner v. City Council* (1958) 164 Cal.App.2d 490, 496 ["While it is clear that mere uncorroborated hearsay or rumor is not competent evidence [citation], the strict rules of evidence which obtain in the courts are not enforced in administrative proceedings"].)

Additionally, courts have not applied the hearsay rule strictly in public hearings because less formality encourages public participation important to administrative decisionmaking. Thus, in *Mohilef v. Janovici*, the court held that a zoning administrator properly considered complaint letters in a nuisance proceeding involving a farm in a residential neighborhood. The court said that "[t]he informality of the public hearings . . . is an important aspect of the decisionmaking process.

"Although the letters of complaint may not have been admissible in a court of law, they serve an important function in the administrative setting. Many residents may be unable to attend the public hearing, but they should still be permitted to register their opinions and feelings on the matter. It follows that the [zoning administrator] should be able to consider such evidence in reaching a decision." (*Mohilef v. Janovici, supra,* 51 Cal.App.4th at p. 294; see also *E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 327 [rejecting claim that findings were "based in large part upon incompetent evidence, including unreliable hearsay statements" in letters from community complaining about problems associated with adult

bookstore]; *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1524 [substantial evidence supporting writ mandating renewal of tavern's permit included favorable letters from community].)

Likewise, courts have held that reports and studies may be considered in administrative proceedings, even if such evidence would be inadmissible under formal rules of evidence. (See *Carmel Valley View, supra,* 58 Cal.App.3d at p. 822 [environmental impact report constitutes evidence which must be considered by public agency and substantial evidence supporting agency's decision]; *Big Creek Lumber Co. v. County of San Mateo* (1995) 31 Cal.App.4th 418, 430 & fn. 16 (*Big Creek*) [rejecting objection to excerpts from university study presented to board of supervisors in hearing on zoning ordinance restricting logging operations near residential areas]; *Goldberger v. Barger* (1974) 37 Cal.App.3d 987, 994-995 [reports of two out-of-state insurance commissioners constituted substantial evidence to support California commissioner's decision that he was unable to find that a license applicant was of good business reputation].)

We conclude that letters from Chief Ross and McClintock for P&D Aviation, and textual materials such as the CalTrans Airport Handbook and Chico Airport Noise Study, could be considered by the Board, even if they would be inadmissible in a court proceeding. This evidence--to which plaintiffs never objected when it was presented, or when cited by the Board in the recommended findings issued in advance of the hearing on

December 1, 1998--constitutes substantial evidence to support the Board's decision to approve the Stephens Project.

3. *Conflicting Evidence*

Plaintiffs maintain the Board's action was invalid because plaintiffs "presented six items of credible, solid and relevant material evidence," and "[t]his evidence firmly establishes that the Stephens Project would not be consistent with the purposes enunciated by the Legislature" in section 21670. Plaintiffs' evidence consists entirely of documentary evidence of the sort to which plaintiffs now object, to wit: (1) two letters from, respectively, the president of plaintiff North Valley Pilots Association and the president of an Aero Union Corporation, an aircraft operator at the Chico Airport, opposing the project because of noise and safety hazards; (2) a letter from the Chico City/Airport Manager opposing the project because the property is under the traffic pattern of the Chico Airport and "adjacent to the very important Airport Safety Zone" (bold omitted); (3) an accident pattern map similar to one adopted by the Commission in amending the Chico Airport Plan; (4) a 1989 map stamped "FAA Approved" showing the locations of accidents at the Chico Airport; and (5) a supplement to the Board's findings that the Stephens Project is consistent with the county's general plan, which plaintiffs cite for the plan's general statements regarding the importance of the Chico Airport and the county's commitment to compatible land use in the vicinity of the airport. Plaintiffs list these items of evidence with a short

description, but without explanation why or how such evidence overmatches the evidence relied on by the Board.

We cannot reverse the Board's decision simply because plaintiffs can point to contradictory evidence in the record. To be sure, in determining whether the Board's findings are supported by substantial evidence, this court reviews the entire administrative record, including evidence contradicting the evidence relied on by the Board, and, in the process, must weigh the evidence to some extent to fairly estimate its worth. (*Kirkorowicz v. Cal. Coastal Com., supra,* 83 Cal.App.4th at p. 986; *Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th 602, 610.) But the items of evidence that plaintiffs enumerate are of the same type, nature, and value as the evidence the Board cited in its findings. At bottom, plaintiffs are seeking to have this court weigh the preponderance of conflicting evidence in their favor, which, as we have said, under the substantial evidence test, we may not do. (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th 602, 610*;* see also *Hartford Accident & Idemnity Co. v. I.A.C.* (1927) 202 Cal. 688, 692 [if the findings are supported by inferences which may be fairly drawn from the evidence, even though the evidence be susceptible of opposing inferences, the reviewing court will not disturb the agency's decision]; *Pacific Employers Ins. Co. v. I.A.C.* (1942) 19 Cal.2d 622, 627 [where plaintiff pointed to evidence contradicting that which supported commission's finding, the Supreme Court said:

"It is not the function of this court to weigh conflicts in the evidence"]; *Regents of University of Cal. v. Public Employee Relations Bd.* (1986) 41 Cal.3d 601, 617 [when an agency chooses between two conflicting views, a reviewing court may not substitute its judgment for that of the agency]; *Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 488 [requirement that court canvas the whole record does not mean "a court may displace the Board's choice between two fairly conflicting views"].)

4. *Presumption of Regularity*

Finally, plaintiffs contend the decision of the Commission was "presumed to be valid" under Evidence Code section 664, and therefore the Board had the "burden of going forward with evidence to rebut that presumption," which "it failed to do."[21] According to plaintiffs, the evidence had to show that the Commission acted "arbitrarily or discriminatorily" to challenge the Commission's decision, and the burden to produce such evidence "was in addition to the burden of making specific findings based on evidence in the record that the project was consistent with purposes stated in" section 21670.

Unsurprisingly, plaintiffs offer no supporting authority for this position which reverses the usual burden in an administrative mandamus proceeding. (See *Desmond, supra,* 21

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[21] Evidence Code section 664 provides in relevant part that "[i]t is presumed that official duty has been regularly performed."

Cal.App.4th at pp. 335-336; see also Cal. Administrative Mandamus (Cont.Ed.Bar 2d ed. 1989) Burden and Standards of Evidentiary Review, § 12.7, p. 378 ["[t]he *petitioner* has the burden of proof in administrative mandamus proceedings because it is presumed that the agency regularly performed its official duty"; italics added].) Plaintiffs emphasize that the Commission "was a governmental agency on equal standing with Butte County," but likewise offer no authority for the proposition that the burden in an administrative proceeding is shifted from the petitioner agency to the respondent agency in such circumstances.

Of course, to overrule the Commission, the Board had to comply with the significant statutory requirements set forth in section 21676, subdivision (b), calling for a two-thirds vote of the Board and specific findings that the Stephens Project was consistent with the purposes articulated in section 21670. (*California Aviation, supra,* 9 Cal.App.4th at p. 1395.) But the procedure mandated by section 21676 does not relieve plaintiffs of the usual burden in a mandamus proceeding. In this case, plaintiffs were constrained to offer evidence supporting the allegations in the petition that the Board abused its discretion by failing to comply with section 21676, in order to overcome the presumption in favor of the correctness of the Board's decision. (See *Arwine v. Bd. of Medical Examiners* (1907) 151 Cal. 499, 503; *Childs v. City Planning Com.* (1947) 79 Cal.App.2d 808, 810-811.) Plaintiffs cannot carry this burden merely by

raising late objections to the evidence relied on by the Board or pointing to some items of contradictory evidence in the record.

D. *Award of Transcription Costs*

Plaintiffs contend the trial court erred in awarding to the Stephenses the cost of transcribing three meetings of the Commission, arguing "[t]here is no evidence that the transcriptions were part of the administrative record." We agree.

The Stephenses sought recovery of these transcription costs under the item on the memorandum of costs form described as "[c]ourt reporter fees as established by statute." On an attached worksheet, the Stephenses identified the authorizing statute as "preparation of administrative record . . . C.C.P. section 1094.5." Code of Civil Procedure section 1094.5, subdivision (a), provides in relevant part: "If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs." (See also *Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 796 (*Ralph's Chrysler-Plymouth)* [under section 1094.5, subd. (a), the prevailing party must be allowed to recover the cost of preparation of the administrative record submitted in a mandamus proceeding, even if such preparation occurred in the administrative proceeding, "so long as the transcript was essential to review and its cost allowable under the language of the applicable statute"]; *Santos v. Civil*

Service Bd. (1987) 193 Cal.App.3d 1442, 1446 ["[t]he prevailing party . . . is entitled to tax the costs of preparing the record"].)

However, the Stephenses do not dispute that these transcripts are not part of the record filed with the trial court. Therefore, under Code of Civil Procedure section 1094.5, the cost of their preparation is not recoverable, even if the transcripts were used in some fashion in the administrative or mandamus proceeding. The Supreme Court so held in *Ralph's Chrysler-Plymouth, supra,* 8 Cal.3d 792. The court disallowed recovery of costs for "copies of transcripts and exhibits which, although used in the administrative proceeding, were not part of the record in the mandamus proceeding. Section 1094.5 provides for recovery of costs of the record in the mandamus proceeding only; this would include the cost of any transcript or exhibits which are part of the record in that proceeding. It would not include additional copies which might have been required in the administrative proceeding." (*Ralph's Chrysler-Plymouth, supra*, 8 Cal.3d at p. 797; see also *Escrow Guarantee Co. v. Savage* (1963) 213 Cal.App.2d 595, 597-600 [cost of copies of transcripts and other documents used by counsel for mandamus petitioner not recoverable]; 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 309, p. 1117 ["[n]o recovery could be had . . . for any evidentiary documents or exhibits that, although used in the administrative proceeding, were not part of

the record in the mandamus proceeding," citing *Ralph's Chrysler-Plymouth*].)

The Stephenses did not seek the cost of additional copies of the record, but evidentiary items that, for one reason or another, were not included in the record. Nonetheless, the Stephenses sought to recover costs under section 1094.5 and may only do so as authorized by that statute. (See *Escrow Guarantee Co. v. Savage, supra,* 213 Cal.App.2d at p. 597 ["'"an award of costs can be justified only if permitted by some statutory provision, and the measure of the statute is the measure of the right."' [Citation.]"]; *Cooper v. State Bd. of Public Health* (1951) 102 Cal.App.2d 926, 933 ["It has been said that he who would claim costs must put his finger on a statute which awards the same. [Citations.]"].)

In light of our conclusion that Code of Civil Procedure section 1094.5 does not permit recovery of the cost of these transcripts, we need not reach plaintiffs' contentions that these costs were not reasonably necessary to the conduct of the litigation (Code Civ. Proc., § 1033.5, subd. (c)(2)) or that the memorandum of costs was not properly verified (*id.*, § 2015.5). (See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 416; *Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 532, fn. 16; *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 342; *Linda Jones General Builder v. Contractors' State License Bd.* (1987) 194 Cal.App.3d 1320, 1328, fn. 15.)

IV. DISPOSITION

That portion of the judgment that awards to defendants the cost of transcribing three meetings of the Commission is reversed. The judgment is otherwise affirmed. Respondents are awarded their costs on appeal in 3 Civil C034216. Appellants are awarded their costs on appeal in 3 Civil C035428.

SIMS, J.

We concur:

BLEASE, Acting P.J.

CALLAHAN, J.